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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JAMES EARL FOX, Petitioner.	)	2 CA-CR 2006-0423-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021192

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 A jury found petitioner James Earl Fox guilty of three counts of first-degree trafficking in stolen property and one count of attempted first-degree trafficking. After finding he had four prior felony convictions, the trial court sentenced him to concurrent, presumptive, 15.75-year prison terms on each of the trafficking counts and to a consecutive,

11.25-year term for attempted trafficking, a total of twenty-seven years. We affirmed his convictions and sentences on appeal but ordered the sentencing minute entry modified to reflect the sentences orally pronounced. *State v. Fox*, No. 2 CA-CR 2003-0025 (memorandum decision filed Apr. 30, 2004).

¶2 In July 2004, Fox filed a *pro se* notice of and petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. A supplemental petition filed by appointed counsel alleged ineffective assistance by trial and appellate counsel in connection with Fox's rejection of a plea agreement the state had offered before Fox's trial in 2002.

¶3 After an evidentiary hearing at which both Fox and his trial counsel testified, the court found trial counsel had been "ineffective"—that is, counsel's performance had been deficient—in only one respect, in failing to inform Fox that he could potentially receive consecutive sentences if he were convicted at trial as charged. Although noting it was debatable whether Fox had suffered actual prejudice, the trial court concluded nonetheless that "fundamental fairness and justice compel[led] relief." Despite its failure to say so expressly, we must infer from the court's decision to grant relief that it necessarily found Fox had suffered some prejudice as the result of counsel's omission.[1] *See generally*

[1]An ineffective assistance of counsel claim has two components: "a defendant must show that counsel's performance fell below objectively reasonable standards and [that] the deficient performance prejudiced the defendant." *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005). If a defendant makes an insufficient showing on either component, a court need not address the other. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984) ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); *State ex rel. Thomas v. Rayes*, No. CV-06-0303-PR, 2007 WL 827390, at *3 (Ariz. Mar. 20, 2007) (same).

¶4 The trial court initially vacated Fox's "sentence as reflected in [the court's] Minute Entry of January 10, 2003,"[2] and scheduled a subsequent hearing at which Fox was "given the opportunity to accept the previously proffered plea agreement or to reject that plea agreement and receive a new trial." Choosing to accept the original plea offer, Fox ostensibly pled guilty in December 2005 to one amended count of attempted first-degree trafficking in stolen property.

¶5 Despite complying with the other requirements of Rules 17.2 and 17.3, Ariz. R. Crim. P., 16A A.R.S., however, the trial court did not ask Fox for a specific, oral plea to the amended charge. Technically, therefore, although Fox had signed the written plea agreement and plainly intended to plead guilty, he never formally entered the guilty plea the court purported to have "accepted and entered of record" at the change-of-plea hearing on December 12. And, as noted, although his "sentence" had been vacated, his convictions technically had not.

¶6 Subsequently, the trial court reconsidered its November order *sua sponte*. At a hearing on January 24, 2006, at which Fox was supposed to have been resentenced, the

[2]It did not, however, vacate his convictions.

court announced that it had mistakenly granted relief it had not intended to grant and consequently was vacating its November order to avoid the "manifest injustice" that would result if Fox inadvertently received a "windfall." Revoking its initial decision to vacate Fox's "sentence" and allow him to plead guilty to a single count as provided in the 2002 plea agreement, the trial court instead granted Fox "that portion of the relief . . . requested on Pages 12 and 13 of his Petition for Rule 32 Relief." While ratifying the three, concurrent, 15.75-year sentences originally imposed on the trafficking counts, the court announced its intention to change Fox's consecutive, 11.25-year sentence for attempted trafficking to make it concurrent with his other sentences, reducing his total effective sentence from twenty-seven years to 15.75.

¶7 After a formal resentencing hearing on that count, Fox sought to appeal the reimposed sentence. We dismissed the appeal because the challenged orders, having been entered in a Rule 32 post-conviction proceeding, were not properly appealable. Fox then obtained leave to file the present delayed petition for review. He contends the trial court's rejection of his December 2005 guilty plea, after it had first accepted and entered the purported plea, violated the constitutional prohibition against double jeopardy. Alternatively, he claims the trial court erred in ruling defense counsel "was not ineffective" for failing to inform Fox he could potentially receive consecutive sentences if he were convicted at trial. The state has filed no response.

¶8 Addressing Fox's second contention first, we find its factual premise faulty because the trial court, in fact, never withdrew or changed its initial finding that trial counsel had been "ineffective" for failing to inform Fox that consecutive sentences were possible. It is clear from the transcript of the January 2006 hearing at which the court vacated its November order granting relief that it was not retracting its finding that counsel's performance had been deficient but only changing the relief it was ordering. The court stated:

> This was the time set for re-sentencing. However, the Court has reexamined *the scope of the relief* granted in its November 28th, 2005, minute entry, and the Court regrettably informs the parties that *the relief granted was improvident* and based on a mistake that was on the Court's part.
>
> The Court is, therefore, going to vacate its ruling as to the November 28th, 2005, order, and the Court believes that the defendant received a windfall that was never intended . . . or contemplated by the Court and contrary to the Court's true intent and that that is, in fact, a manifest injustice.

(Emphasis added.)

¶9 Having effectively found that Fox had shown both deficient performance and prejudice and thus had established his claim of ineffective assistance by trial counsel, the court was then free to "fashion a suitable remedy," *State v. Donald*, 198 Ariz. 406, ¶ 30, 10 P.3d 1193, 1202 (2000), "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 668

(1981). By resentencing Fox to make all four of his sentences concurrent, the trial court accomplished that objective.

¶10 At the Rule 32 evidentiary hearing, Fox's trial counsel, Steven West, testified he was certain he had made clear to Fox the difference between the presumptive sentence of 3.5 years and sentencing range of two to 8.75 years provided in the plea offer versus the presumptive sentence of 15.75 years Fox faced if he were convicted at trial of a single, class two felony with at least two prior felony convictions. West was less clear about the specific sentencing range he had told Fox he faced, but West testified the "realistic range" that he "typically" communicates to all clients, excluding both the substantially mitigated and substantially aggravated sentences, was, in Fox's case, from fourteen to twenty-eight years. Although Fox claimed never to have seen the written plea agreement before trial, he acknowledged West had "informed [him] of a three-year plea" and had told him he could potentially receive a maximum sentence of fourteen years.

¶11 Fox testified he had "relied on [his] attorney" in rejecting the offered plea, West had expressed confidence that "things would go pretty good" at trial, and Fox would have accepted the plea offer in 2002 had he been shown the written agreement and been informed that he could potentially receive consecutive sentences. West, on the other hand, testified that Fox had not been interested in accepting a plea agreement, had wanted to take the case to trial, and—in West's view—had been overconfident of winning acquittal. West testified: "He was taking a significant risk to go to trial, and that's what he wanted to do.

And we discussed what the risks were." West was sure he had not told Fox how many years he could spend in prison if he were given consecutive sentences because, West testified, that possibility "seemed inconceivable" under the circumstances.

¶12 As the sole arbiter of witness credibility, *State v. Engram*, 171 Ariz. 363, 368, 831 P.2d 362, 367 (App. 1991); *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988), the trial court could reasonably have concluded from the testimony at the evidentiary hearing that Fox had knowingly rejected the chance to plead guilty to an offense for which the presumptive sentence was 3.5 years, in favor of gambling at trial on either being acquitted or receiving concurrent, presumptive sentences on three offenses carrying presumptive sentences of 15.75 years. Because trial counsel acknowledged having failed to tell Fox that his effective sentence could be much longer, the trial court's remedy for counsel's omission placed Fox in the very position he had been told he might occupy if he rejected the plea agreement and proceeded to trial. We cannot say the trial court abused its discretion in granting Fox a remedy he had expressly requested. *See State v. Morgan*, 204 Ariz. 166, ¶ 25, 61 P.3d 460, 467 (App. 2002) (post-conviction rulings reviewed for abuse of discretion).

¶13 We find no merit to Fox's argument that the trial court's rejection of his plea agreement after first purportedly accepting it violated Fox's right to be free of double jeopardy in violation of the Fifth Amendment to the United States Constitution and article II, § 10 of the Arizona Constitution. First, as we have noted, the court had never actually

vacated Fox's original convictions before conducting the flawed December 2005 change-of-plea hearing.

¶14 Second, unlike the defendants in the two cases Fox cites in support of his double jeopardy argument, *Lombrano v. Superior Court*, 124 Ariz. 525, 606 P.2d 15 (1980), and *Campas v. Superior Court*, 159 Ariz. 343, 767 P.2d 230 (App. 1989), Fox had first been convicted after a trial. He was entering a guilty plea only because the court allowed it as a form of post-conviction relief. Jeopardy had previously attached when the jury was impaneled at his trial, *Parent v. McClennen*, 206 Ariz. 473, ¶ 9, 80 P.3d 280, 282 (App. 2003), and Fox effectively waived any double jeopardy violation associated with his later guilty plea when he requested that very relief. For the trial court to rescind its initial order granting relief and thus ratify or restore Fox's original convictions did not violate double jeopardy.

¶15 Finding no abuse of the trial court's discretion and no violation of the constitutional protection against double jeopardy, we grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge